

IN THE CIRCUIT COURT OF THE 15<sup>TH</sup>  
JUDICIAL CIRCUIT IN AND FOR  
PALM BEACH COUNTY, FLORIDA

CASE NO: 2014 CA 002034 (AA)

CHARISSE Y. MATTHEWS and  
WAYNE A. DIXSON, individually  
and as Parents and Natural Guardians  
of MATTHEW DIXSON, a minor,

Plaintiffs,

vs.

DUDLEY G. BROWN, JR., M.D.;  
TENET FLORIDA PHYSICIANS SERVICES,  
LLC; BERTO LOPEZ, M.D.; BERTO  
LOPEZ, M.D., P.A.; and TENET  
GOOD SAMARITAN, INC. d/b/a GOOD  
SAMARITAN MEDICAL CENTER,

Defendants.

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NOTICE OF FILING.

Plaintiffs, CHARISSE Y. MATTHEWS and WAYNE A. DIXSON, individually and as  
Parents and Natural Guardians of MATTHEW DIXSON, a minor, by and through the  
undersigned counsel, hereby give Notice of Filing the transcript of the October 16, 2015 hearing  
before the Honorable Richard L. Oftedal, into the above styled court file.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice has been furnished by electronic mail via the Florida Courts e-filing Portal to all counsel on the attached service list this 6<sup>th</sup> day of November, 2015.

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IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 2014 CA 002034 (AA)

CHARISSE Y. MATTHEWS and WAYNE A. DIXSON,  
individually and as Parents and Natural  
Guardians of MATTHEW DIXSON, a minor,

Plaintiffs,

vs.  
DUDLEY G. BROWN, JR., M.D.;  
et al.,

Defendants.

HEARING HELD BEFORE THE HONORABLE RICHARD L. OFTEDAL

TAKEN ON BEHALF OF THE PLAINTIFFS  
OCTOBER 16, 2015  
10:29 A.M. TO 11:52 A.M.

PALM BEACH COUNTY COURTHOUSE  
205 NORTH DIXIE HIGHWAY  
WEST PALM BEACH, FLORIDA 33401

REPORTED BY:  
MELISSA KALLAS  
NOTARY PUBLIC, STATE OF FLORIDA



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3                   THE COURT: Good morning, everybody. Please  
4                   be seated.

5 Let's begin. Let me have everybody make their  
6 appearance for the record, please.

7 MS. KREIZINGER: Loreen Kreizinger and Ryan  
8 Mosher on behalf of the Plaintiffs.

9 MR. COMRAS: Manny Comras on behalf Dr. Dudley  
10 Brown and Tenet Florida Physician Services.

11 MR. LEA: Gordon Lea on behalf of Berto Lopez,  
12 MD and Berto Lopez, MD PA.

13 MR. WEBBER: John Webber on behalf of Good  
14 Samaritan.

15 MS. KRUSBE: Donna Krusbe on behalf of Dr.  
16 Brown and Tenet Physician Services.

17 THE COURT: We have a full house. Let's get  
18 started. The first issue, should we address the  
19 Motion In Limine first?

20 MR. COMRAS: Yes, Judge, I know there's other  
21 issues we want to discuss as part of the case  
22 management conference part of it, but we would like  
23 to proceed first with the Motions In Limine.

24 THE COURT: Okay, I read the motion, and some  
25 of the case law, so I'm pretty much up to speed.

1 MS. KREIZINGER: Your Honor, there have been  
2 more Motions In Limine that have been filed.

3 THE COURT: This is a real problem, when I  
4 have a specially set case, and you all start filing  
5 motions on the eve of trial, I don't have time to  
6 hear them all.

7 MS. KREIZINGER: We got the last one in from  
8 Opposing Counsel at 6 o'clock last night, and I  
9 heard about it 10 o'clock last night. I think we  
10 are all ready to argue those.

11 THE COURT: I'm not sure I have all of the  
12 time to hear them. It is not the way it seems to  
13 be it should go. It has been rolled over once or  
14 more, and now, all of these motions on the eve of  
15 trial, it is unacceptable, really. I agreed to set  
16 time aside today to hear these, now I find out  
17 there are more. I'm not sure if I'm going to get  
18 to them.

19 MS. KREIZINGER: We have agreed to number of  
20 them, your Honor.

21 THE COURT: I have no problem with the things  
22 that you agree on. Let's see what we can get done  
23 today. I know we have this one.

24 Begin.

25 MR. COMRAS: Okay, Judge.

1           We filed four different Motions In Limine. The  
2 first one that I have, I don't know if you have it  
3 in front of you, is our Motion In Limine to  
4 prohibit treating physician John Grossman, MD, from  
5 giving causation and standard-of-care opinions  
6 and/or bolstering his opinions with reference to  
7 medical literature.

8           THE COURT: I have read that.

9           MR. COMRAS: I can represent to the Court that  
10 during his deposition, Dr. Grossman advised us that  
11 he didn't intend to give standard-of-care opinions  
12 in this case. I assume Plaintiffs' Counsel is not  
13 planning on eliciting those types of things from  
14 him. What concerns me, is the way he testifies,  
15 seems to impart some liability on behalf of Dr.  
16 Brown. Here we have a peripheral hand surgeon who  
17 saw the Plaintiff, the young Plaintiff, many months  
18 after the incident that occurred at Good Samaritan  
19 Medical Center, and he's retrospectively looking  
20 back without the benefit of any medical records,  
21 other than his own medical records without the  
22 benefit of any depositions whatsoever, and saying  
23 that "I believe this injury was caused as a result  
24 of the vaginal delivery of this baby." I think it  
25 is inappropriate. I don't think there's a basis

1 for it or a foundation for it. Even though he's  
2 unwilling to admit that is his sole basis for  
3 coming to his opinion that there's an injury, and  
4 therefore there must have been something that  
5 happened during the vaginal delivery, something  
6 that was perhaps negligent. I think he kind of  
7 does in fact say that.

8 THE COURT: Where does he, in fact, does say  
9 that?

10 Point to me the specific language.

11 MR. COMRAS: Sure, Judge.

12 If you look at the deposition, throughout the  
13 deposition, there's different parts of it, he talks  
14 about how extensive the injury was, he talks about  
15 the type of damage that was done to the nerve, the  
16 type of damage that was done to the muscle, that  
17 there was scarring, that there was a neuroma, all  
18 of these different things. Then, when he's asked,  
19 he keeps relating it back to, "Well, this is all  
20 part of the vaginal delivery. He says it multiple  
21 times throughout the deposition when he is asked  
22 that "this is all part of the vaginal delivery."  
23 My position is, Judge, he doesn't have any basis,  
24 in fact, to make that opinion. He's relying solely  
25 on the fact that he has this injury in order to try

1 and relate it back to something that happened  
2 during the vaginal delivery.

3 THE COURT: Is this a res ipsa argument, that  
4 there's no way this child could have been injured  
5 except through the delivery?

6 MR. COMRAS: The problem with res ipsa, Judge,  
7 if he saw this patient within minutes of the  
8 vaginal delivery and had that opinion, that could  
9 be understandable, but there were many months  
10 between delivery and the child being seen by the  
11 Doctor. There's many opportunities for this child  
12 to have been reinjured, or injured himself or  
13 injured by someone else during that period of time,  
14 so while there may have been some initial injury,  
15 to try to relate back the entire injury to this  
16 vaginal delivery without the benefit of any  
17 deposition or medical records, we think it is  
18 inappropriate, improper, and also a comment on the  
19 standard of care as it pertains to Dr. Brown.

20 THE COURT: He's not offering any standard-of-  
21 care opinion as such per se?

22 MR. COMRAS: He's not saying "I believe  
23 someone deviated from the standard of care."

24 THE COURT: He is not saying someone was  
25 negligent, either, right?

1                   MR. COMRAS: Well, that is where it is a  
2 little difficult. He's essentially saying, Judge,  
3 that there was excessive lateral traction that  
4 caused this injury. That plays into Plaintiffs'  
5 theory which is that they believe Dr. Brown used  
6 excessive force in delivering this baby, and that  
7 is a criticism of their expert and that is a  
8 criticism that they are alleging against our  
9 Doctor. In a sense, they are back-dooring this  
10 criticism, "Wait a minute, we are not really saying  
11 it is a criticism," but as it a backdoor criticism  
12 of Dr. Brown.

13                  THE COURT: Thank you.

14                  Response?

15                  MS. KREIZINGER: Yes, your Honor. Let me  
16 explain who Dr. Grossman is, he is one of three  
17 surgeons in the country that treat children with a  
18 brachial plexus injury. What happened in this  
19 case, we had an 11-pound-11-ounce baby. He should  
20 have C-section'd it, and as a result, the child was  
21 delivered and there was extensive lateral traction  
22 placed on this child's head. Dr. Brown broke the  
23 resume humerus in half on the right and on the  
24 left, ripped the C5 and C6 nerves that come off of  
25 the spine. Dr. Grossman is one of three surgeons

1           that performs surgery on these children, and he  
2           testified under oath that based on the MRIs, based  
3           on the interoperative findings, this is a traction  
4           injury, this is not something that happened any  
5           other way. He said this is a traction injury, he  
6           saw it himself, he tried to repair it, and bring  
7           the nerves back together, he found scar tissue, and  
8           based on his training, education, he testified to  
9           causation numerous times. He's never been  
10          disqualified as an expert. He's our surgeon who  
11          absolutely can testify to causation. This was only  
12          caused by a traction injury by putting so much  
13          pressure on the head, and forcing the head down.

14           THE COURT: Is he going to go beyond what he  
15          testified to in his deposition?

16           MS. KREIZINGER: No, he is not. He said  
17          specifically this is a traction injury, it occurred  
18          at the time of the delivery. He said I'm not  
19          rendering a standard-of-care opinion. It happened,  
20          it is a traction injury. He's the one person with  
21          his own eyes and objective findings saw the injury  
22          and he has the training and experience to testify  
23          to this. He's the surgeon in the case.

24           THE COURT: Are you going to attempt to  
25          bolster his testimony with any medical literature.

1 MS. KREIZINGER: No, your Honor, absolutely  
2 not. We agreed in a Motion In Limine that no  
3 bolstering is going to happen with articles.

4 THE COURT: I'm going to deny the Motion In  
5 Limine.

6 MR. COMRAS: If I can add just one or two more  
7 things?

8 THE COURT: Okay.

9 MR. COMRAS: Judge, I'm not disputing this is  
10 a traction injury. There's a difference between  
11 saying it is a traction injury and this is a  
12 traction injury that occurred at the time of  
13 delivery. On top of that, there's other evidence  
14 and discussion by the experts that this type of  
15 injury can in fact happen by way of a C-section,  
16 can happen inter-uterine, doesn't necessarily happen  
17 from a vaginal delivery. But to have this doctor  
18 come in and say he knows this is because the head  
19 was pulled in a certain direction or the head was  
20 pulled too hard, it is inappropriate, he hasn't  
21 reviewed any depositions or medical records. If  
22 you want to say this is a traction injury, fine.  
23 We are not opposing that, but I don't think he can  
24 go and say this is a traction injury that is as a  
25 result of vaginal delivery.

1                   THE COURT: Obviously, you disagree on that.

2                   I'm going to deny the motion, providing, again, he  
3                   doesn't go beyond what he stated in his deposition,  
4                   as far as testimony regarding standard of care or  
5                   negligence.

6                   Next issue?

7                   MR. COMRAS: Our next issue is the Motion In  
8                   Limine regarding Nurse Lagana from directly or  
9                   indirectly criticizing the care and treatment  
10                  provided by Dr. Brown.

11                  THE COURT: That one I have not seen.

12                  Does somebody have a copy of that motion? When  
13                  was that filed?

14                  MR. COMRAS: If I can approach, Judge?

15                  (Handing.)

16                  THE COURT: When was this filed?

17                  MR. COMRAS: I'll take a look at the back.

18                  THE COURT: September 18th.

19                  MR. COMRAS: September 18th, correct.

20                  THE COURT: When did she give her deposition?

21                  MR. COMRAS: She actually finished her  
22                  deposition yesterday afternoon. So we had one part  
23                  of her deposition taken. We filed this in the  
24                  interim and the final part of her deposition was  
25                  finished and concluded yesterday.

1                   THE COURT: When did you do first part of the  
2 deposition?

3                   MR. WEBBER: July.

4                   THE COURT: My question, again, apparently,  
5 whatever gave rise to this motion occurred in July,  
6 and here I am asked to address it the week before  
7 trial. Again, I don't know why it was not set  
8 earlier to have this heard, but here we are, let's  
9 go forward.

10                  MR. COMRAS: Judge, this is our motion to  
11 prohibit the nursing expert from directly or  
12 indirectly criticizing the care given by Dr. Brown.  
13 Nurse Lagana is just that, a nurse. Dr. Brown, who  
14 I represent, is a physician, an OB/GYN, and  
15 although she has come out multiple times in her  
16 deposition and said she's not qualified to give  
17 standard-of-care opinions as to OB/GYN care, and  
18 she's not qualified to render standard-of-care  
19 opinions against Dr. Brown, she still throughout  
20 her deposition and throughout her deposition  
21 yesterday, continued to make comments that were  
22 deviations from the standard of care that relate  
23 directly back to Dr. Brown.

24                  THE COURT: Like what?

25                  MR. COMRAS: For instance, Judge, she

1 indicated, whether or not an episiotomy was  
2 something that was appropriate or not appropriate.  
3 She says there's a bunch of things in the  
4 literature that indicate it is no longer really  
5 appropriate, however under certain circumstance it  
6 is may be appropriate. An episiotomy is a decision  
7 made by Dr. Brown, he went forward with it, there's  
8 no reason for her to comment at all whether or not  
9 an episiotomy is appropriate. She's made  
10 commentary that she believed Dr. Brown used  
11 excessive force in the delivery of this baby.  
12 Again, she doesn't deliver babies. She's a nurse.  
13 She admits she's not qualified to give standard-of-  
14 care opinions against Dr. Brown, and she continues  
15 to make these allegations. When you pressure her,  
16 she says "I'm not saying they are deviations from  
17 the standard of care, I can't comment on that."  
18 She still comments on it and makes it part of the  
19 commentary when asked questions about the nurses.

20 THE COURT: She's asked questions about the  
21 nurses?

22 MR. COMRAS: She's asked questions about the  
23 nurses, she starts making gratuitous commentary  
24 regarding Dr. Brown. She also has other opinions  
25 that she says relates to the nurses, but actually

1 relate to Dr. Brown. For example, she said Pitocin  
2 should not be given to this mother. Well, the  
3 decision to give Pitocin was made by Dr. Brown. So  
4 here we have a nurse criticizing Dr. Brown for  
5 deciding to give Pitocin. Again, it is  
6 inappropriate. Of course, she's trying to shadow  
7 it, saying, "I'm critical of the nurses giving it  
8 to the patient," but she's really saying "I'm  
9 critical of the nurses for following Dr. Brown in  
10 deciding to give Pitocin." She also made  
11 commentary that Dr. Brown should have come in  
12 earlier than he did. She also said she doesn't  
13 believe there was an appropriate informed consent  
14 obtained. All of these things are physician  
15 issues, whether it is Dr. Brown, Dr. Lopez or  
16 another physician, they are not nursing issues.  
17 She should not be allowed to give any opinions that  
18 relate whatsoever or negatively impact Dr. Brown or  
19 Dr. Lopez.

20 THE COURT: Thank you.

21 Response?

22 MS. KREIZINGER: Yes, your Honor. Dr. Lagana,  
23 she is a nurse PhD. She finished her testimony  
24 yesterday, and she said numerous times "I'm not  
25 going to testify as to the standard of care of Dr.

1 Brown." What she's testifying to as it relates to  
2 informed consent is she said "the nurses had a duty  
3 and responsibility to document on the chart that  
4 there was a discussion between Dr. Brown and the  
5 patient before giving this dangerous drug Pitocin."  
6 That is what she said. She's critical of the  
7 nurses. She also said the nurses shouldn't have  
8 started the Pitocin without an estimated fetal  
9 weight on the chart. This child was over 11  
10 pounds, and it is her position in the standard of  
11 care of nursing only, that a nurse never starts  
12 Pitocin without an estimated fetal weight on the  
13 chart, because if the child is so big, they are  
14 going to have head compressions, and the head will  
15 be bruised just like what happened in this case.  
16 Her criticism is only against the nurses.

17 THE COURT: The argument is as you know, is  
18 something of a backdoor attack on the doctors by  
19 saying that the nurses shouldn't have administered  
20 Pitocin when the decision whether to administer  
21 Pitocin is a doctor's decision, in fact, it is a  
22 criticism of the doctor.

23 MS. KREIZINGER: Because there's supposed to  
24 be a policy and procedure to the fact that a nurse  
25 is not to give Pitocin without an estimated fetal

1 weight on the chart, that is the standard of care.

2 THE COURT: Irrespective of what the doctor  
3 says?

4 MS. KREIZINGER: Absolutely. You have to go  
5 through the chain of command. You as the nurse, if  
6 a doctor says to go and give a certain medication  
7 and you are fearful there will be a problem with  
8 the patient, you as the nurse have to go through  
9 the chain of command. She's not saying he's wrong  
10 in giving it, she said that the nurse is not to  
11 give that without an estimated fetal weight on the  
12 chart. That is her criticism. She never said he  
13 couldn't give Pitocin. Her focus is solely on the  
14 nurses, and that is what she kept saying yesterday.  
15 I'm not testifying against Dr. Brown, I'm telling  
16 you the standard for nurses.

17 THE COURT: What about the episiotomy?

18 MS. KREIZINGER: Regarding the episiotomy, she  
19 didn't say the patient didn't need an episiotomy.  
20 What she said is the nurses had a responsibility to  
21 make sure he gave some type of anesthetic before he  
22 cut an episiotomy and he gave no anesthetic. The  
23 nurses have to be an advocate for that patient.  
24 She never said he couldn't do an episiotomy, she  
25 only said the nurses should say, "Hey, Doctor, she

1 has no anesthesia. You want me to get anesthesia  
2 here? You are going to cut her." That is it. She  
3 never testified she doesn't need an episiotomy, it  
4 is just the nurse goes with that particular  
5 procedure, that is it. She's not crossing the  
6 line, and she won't cross the line at the time of  
7 trial. She made that very clear yesterday.

8 THE COURT: What about the issue of excessive  
9 force?

10 MS. KREIZINGER: She never said in her  
11 deposition, if Mr. Comras can point it out, she  
12 never said "excessive force" anywhere. It is not  
13 documented anywhere. She never testified to it.  
14 Excessive force is what was done by Dr. Brown, and  
15 she didn't have opinions as it relates to Dr.  
16 Brown. That is absolutely false. It is not in her  
17 deposition.

18 MR. COMRAS: Her deposition was concluded  
19 yesterday, we don't have a transcript. She did  
20 mention the fact that she believes there was  
21 excessive force. If she is saying she's not going  
22 to include that all and not make commentary, we  
23 agree on that Motion In Limine, if it is precluded.  
24 Again, Judge, these are all back-door criticisms  
25 against our Doctor.

1           THE COURT: Isn't it possible, there will be  
2       some overlap? I mean, it might be that you can't  
3       argue against what the nurses did without somewhat  
4       indicating the doctors without bringing in the  
5       nurses?

6           MR. COMRAS: For the first time, this is the  
7       difference, in the last two years we had the case,  
8       we heard a new criticism, which is they should have  
9       initiated a chain of command. It was never  
10      discussed in Nurse Lagana's deposition, or  
11      discussed in the complaint or anywhere else. Now,  
12      we are hearing they should have initiated a chain  
13      of command.

14           THE COURT: That is a different argument,  
15       whether or not she should be able to give these  
16       opinions in the first place though, right?

17           MR. COMRAS: That is correct, Judge. In a  
18      sense, Judge, I was not prepared to talk about  
19      chain of command, because it was not an issue up  
20      until just now. Again, Judge, it is one thing to  
21      say that the nurses should have initiated a chain  
22      of command, I can understand that. It is another  
23      thing to say, "You nurse, were negligent, because  
24      you didn't make sure Dr. Brown didn't come in here  
25      sooner, because he should have been here sooner."

1           The implication is that he needed to be here  
2           sooner.

3           THE COURT: Is that going to be your  
4           testimony?

5           MS. KREIZINGER: Well, your Honor, what is  
6           going to happen is, and Dr. Lagana testified  
7           yesterday on this chain of command, my client  
8           showed up at 5:30 in the morning at Good Samaritan.  
9           This baby was delivered around 1:20. He showed up  
10          11 minutes before the delivery, had no idea of what  
11          he was going to be dealing with.

12          THE COURT: Is this witness going to be  
13          offering an opinion to the doctor in that regard,  
14          being late?

15          MS. KREIZINGER: No, the nurse is going to say  
16          the nurses had a responsibility to make sure they  
17          communicated to Dr. Brown there was no fetal weight  
18          on the chart, and if there was no fetal weight on  
19          the chart and he didn't come in, they needed to go  
20          through the chain of command. That is what she  
21          said yesterday. This is not something new I'm  
22          springing on the Court today. She testified about  
23          it yesterday. That is what happens, that is the  
24          standard of care. "If you are going to give  
25          Pitocin, you got to have an estimated fetal weight.

1       There wasn't one in the chart. They gave it. Now,  
2       we have a problem with the child." She's not going  
3       to testify against Dr. Brown. There's an overlap,  
4       of course, in regards to certain things, but she's  
5       only talking about the standard of care for nurses.

6             THE COURT: The judicial argument, I was, to  
7       some extent sympathetic with the position taken by  
8       the Defense in this case, that is, I don't think  
9       that I don't think that a nurse should comment or  
10      give opinions regarding the doctor's standard of  
11      care or any negligence related thereto. But  
12      hearing in more detail of what the actual testimony  
13      is regarding the Pitocin, the issue of informed  
14      consent, seems to me that is not exactly what is  
15      happening. I don't know if that can be structured  
16      so there can't be some spillover.

17           I'm going to deny the motion. Again,  
18       obviously at trial, I want to hear what she says at  
19       trial, if in fact there's a crossing of the line,  
20      I'm happy to step in.

21           MR. COMRAS: Judge, I understand your ruling,  
22      we do have at least an agreement or maybe perhaps  
23      the motion is granted in part insofar as she's not  
24      allowed to testify that an episiotomy was  
25      inappropriate, that Dr. Brown used excessive force

1           in the delivery of this baby?

2           THE COURT: I think that is right. I mean,  
3           based upon the proffer you gave me, she's not going  
4           to testify to that Dr. Brown deviated from the  
5           standard of care because he ordered Pitocin, right?

6           MS. KREIZINGER: Your Honor, she's not going  
7           to testify, I'll stipulate, that Dr. Brown used  
8           excessive force, or he fell below the standard of  
9           care because of the episiotomy. She has no opinion  
10          on that, only that the nurses need to be an  
11          advocate; "if you are going to do an episiotomy,  
12          give the patient something for the pain," that is  
13          all.

14          THE COURT: If that is the extent of the  
15          testimony, I'll deny the Motion in Limine. If it  
16          goes beyond that, by all means, I'll be happy to  
17          rule.

18          What else do we have?

19          MR. COMRAS: The last, Judge, is a Motion In  
20          Limine, I'm arguing, that I'm arguing, the Motion  
21          In Limine regarding criticisms of Dr. Brown's  
22          general knowledge of obstetrics and brachial plexus  
23          injuries. What I'm really focusing on here, Judge,  
24          is that Plaintiffs' expert had a criticism of Dr.  
25          Brown. Dr. Brown is a board-certified OB/GYN,

1 delivered hundreds if not thousands of babies in  
2 the past, and their expert, Dr. Botley Gary,  
3 actually came out and made an allegation that he  
4 thought my Doctor just wasn't that bright, wasn't  
5 that smart, didn't know the general basics of  
6 OB/GYN care. I think that is inappropriate.

7 THE COURT: Do you have the actual passage of  
8 the actual statement that he made?

9 MR. COMRAS: I don't think I brought the  
10 deposition with me. I can tell your Honor, that  
11 that was one of the criticisms which was that Dr.  
12 Brown had some lack of overall OB/GYN knowledge,  
13 and I think that is an inappropriate comment. I  
14 think Dr. Brown himself is an expert. You will see  
15 the Plaintiffs' attorney also filed a Motion In  
16 Limine to preclude one expert from testifying and  
17 criticizing another expert, and technically, Dr.  
18 Brown is not only a Defendant, but he's also an  
19 expert, he's a board-certified OB/GYN, and I just  
20 think it is inappropriate for anyone to come in and  
21 challenge Dr. Brown's general knowledge of OB/GYN  
22 care.

23 THE COURT: It would be easier if I knew  
24 exactly what the testimony is.

25 MS. KREIZINGER: Your Honor, I don't have it,

1       but we are talking about is I'm absolutely allowed  
2       to go into what this Doctor knows as it relates to  
3       obstetrics. This physician is a board-certified  
4       obstetrician. He doesn't know how the injury  
5       happened. It is an obstetrical injury, brachial  
6       plexus, that happened in an obstetrical patient by  
7       the hands of an obstetrician and in an obstetrical  
8       ward.

9           I went in and asked him, basically, "Do you  
10      understand how a brachial plexus injury happens at  
11      the time of delivery?"

12           He absolutely had no knowledge.

13           I asked him, "Do you know the stages of  
14      labor?", which the nurses even know, "I don't know  
15      them." "Do you know the difference between a  
16      stretch injury and a permanent injury, a transient  
17      injury, axial traction which doctors used at the  
18      time that they used a suction?"

19           He didn't know the basics. My expert  
20      absolutely has the right to say under oath that he  
21      has concerns that Dr. Brown doesn't understand the  
22      basics as to obstetrics, because he absolutely  
23      doesn't. I asked him simple, simple medical terms,  
24      he didn't know them, Judge. That is why we are  
25      here today with a horrific injury. As it relates

1 to his knowledge, what he knows, it is all  
2 regarding obstetrics. I didn't ask him something  
3 that a neurosurgeon would know. I asked him only  
4 questions that an obstetrical doctor would know,  
5 that are in the obstetrical books that are a part  
6 of the American College of Gynecologists which he  
7 is a member of, and he's board-certified. Because  
8 he didn't know those things, yes it goes to his  
9 credibility, goes to his knowledge, and I'm allowed  
10 to ask the questions and my expert can comment as  
11 it relates to a Defendant in a case regarding  
12 whether or not he feels the doctor understands the  
13 basics of obstetrics, especially as it relates to  
14 this injury.

15 THE COURT: How does that play out? How does  
16 the question and answer go with your expert?

17 MS. KREIZINGER: I don't know. I don't have  
18 his testimony. I'm not sure what Mr. Comras is  
19 referring to.

20 THE COURT: I need more detail. The question  
21 is obviously asked, and once the question is asked  
22 and what the response is, and I don't know if the  
23 question is going to be "Should a doctor in this  
24 position have the necessary knowledge regarding X,  
25 Y and Z?"

1                   And the answer is: "Yes, anybody delivering a  
2                   baby should know X, Y and Z. If you don't know  
3                   that, you shouldn't be in the operating room."

4                   Or is it going to be, in general terms, "Was  
5                   he an idiot? Was he stupid?"

6                   I don't know what it is going to be.

7                   MR. COMRAS: I'm not saying that Ms.  
8                   Kreizinger can't ask certain questions that relate  
9                   to OB/GYN care. I don't believe what Ms.  
10                  Kreizinger relayed to your Honor was accurate. She  
11                  asked a lot of questions that were outside the  
12                  scope.

13                  THE COURT: It is hard for me to rule in a  
14                  vacuum.

15                  MR. COMRAS: I understand, Judge. More so  
16                  than that, Judge, I think it is completely  
17                  inappropriate. Like I said, Ms. Kreizinger has a  
18                  motion she filed that has all of the case law she's  
19                  relying on, that indicates you are not supposed to  
20                  use one expert to criticize the opinions of another  
21                  expert.

22                  THE COURT: I think we all understand that.

23                  MR. COMRAS: That is my point.

24                  THE COURT: I'll reserve ruling on this  
25                  motion. Again, I don't know, if you are concerned

1 if we have to proffer that testimony and send the  
2 Jury out for a few minutes while we hear it, maybe  
3 we can do that, I'm not comfortable ruling on it  
4 now in this vacuum.

5 MR. COMRAS: Thank you, Judge.

6 MS. KREIZINGER: Okay.

7 THE COURT: What else do we have?

8 MS. KRUSBE: Good morning, your Honor.

9 This is Dr. Brown's position Motion In Limine  
10 to preclude any evidence that there was a Social  
11 Security determination of disability with regard to  
12 the child. We filed -- this was filed. Do you  
13 have a copy of the motion?

14 THE COURT: If I do, I apologize, I didn't  
15 read it. I didn't see it on there.

16 MS. KREIZINGER: We filed a response, too, and  
17 so, I can provide the Court with the response that  
18 we filed. (Handing.)

19 MR. COMRAS: If I can approach, Judge, I can  
20 give you a copy?

21 THE COURT: Okay.

22 MR. COMRAS: (Handing.)

23 MS. KREIZINGER: This is the motion in  
24 opposition, with the case law (Handing.)

25 THE COURT: Okay. Thank you.

1           Since I have not read this, I will have to do  
2           it on the fly.

3           MS. KRUSBE: It is a very simple motion, your  
4           Honor. It is three pages. Basically, our evidence  
5           of determination of disability by the Social  
6           Security Administration is inadmissible for three  
7           reasons. First of all, when the Social Security  
8           Administration determines disability, they are  
9           applying different standards than what are applied  
10          in a med-mal case, and they a different goal. They  
11          are more lenient in leaning towards providing  
12          benefits to the disabled person.

13          And finally, that is a proceeding in which the  
14          Defendant in a med-mal case did not get to  
15          participate. So, and as far as any basic  
16          evidence --

17          THE COURT: Has this issue ever come up  
18          before?

19          MS. KRUSBE: You mean ever or in this case?

20          THE COURT: Is there case law?

21          MS. KRUSBE: Well, I cited case law, I cited  
22          the Bob Wilson versus Mohammed case that talks  
23          about the letter, says the Social Security award  
24          letter is inadmissible hearsay. I cite -- I found  
25          a New Jersey case that -- I understand that New

1 Jersey doesn't control in Florida, but it has a  
2 really good analysis of why evidence of Social  
3 Security disability does not apply. This is the  
4 Villanuevo versus Zimmerman case. I can provide  
5 your Honor a copy. (Handing.)

6 THE COURT: Is there a particular nuance or  
7 New Jersey law that would make the holding in that  
8 case opposite to Florida?

9 MS. KRUSBE: I quoted a pretty long quote in  
10 my motion that lays out the rational. It says, "In  
11 Social Security Disability hearings, the ALJ has an  
12 affirmative obligation to assist the Claimant in  
13 developing the facts." Clearly the Judge in a med-  
14 mal case, does not have that. "In evaluating  
15 whether substantial evidence supports the ALJ's  
16 findings, lenience should be shown in establishing  
17 the Claimant's disability." Clearly, a different  
18 standard. "The special nature for proceeding for  
19 disability benefits undermines the probative value  
20 of a Social Security Administration determination  
21 of disability in an adversarial trial, where the  
22 plaintiff bears the burden of proof."

23 So for them to come in and say to the Jury,  
24 "This child has already been declared disabled."  
25 It kind of states the ultimate fact that we are

1       here to try in the case, and the Jury is to decide  
2       as the trier of fact.

3           THE COURT: Your objection is not on hearsay,  
4       correct?

5           MS. KRUSBE: Your Honor, it would be, to this  
6       date, as far as I know, they have not come in with  
7       any substantive evidence or letters, anything like  
8       that, as far as from the Social Security  
9       Administration, so certainly, we would object if  
10      they were to attempt to admit some letter like  
11      that, but we don't want any argument or testimony  
12      or anything eluding to the fact that the Social  
13      Security Administration has already determined this  
14      child to be disabled.

15           And Mr. Comras just advised me that we have an  
16      IME report that indicates the child is not  
17      disabled. I can say that kind of flows into the  
18      Plaintiffs' response to our motion which was filed  
19      last night. I will cite a case, the Turner case, I  
20      really think it is entirely inapplicable, cite the  
21      case for the proposition that the Court should use  
22      the Disability standard definition of "disability"  
23      as set out in the Social Security statutes.

24           First of all, in the Turner case, the Court  
25      says, "The Florida legislature has not defined

1       "permanent disability. It appears no Florida  
2       appellate court has construed "Permanent Total  
3       Disability" as it applies to a child's loss of  
4       parental consortium or a parent's loss of filial  
5       consortium."

6              Right there, the Court says it has never been  
7       decided. Then it goes on to say that "It is  
8       anticipated when the Florida appellate courts  
9       address the issue, they will define "Permanent  
10      Total Disability" as the phrase already defined by  
11      the Florida Workers' Compensation Law and Social  
12      Security Act." The citation they give for that is  
13      a Florida Bar Journal article, and they are  
14      basically citing this Florida Bar Journal article  
15      and I guess adopting whatever the author of that  
16      article believes will happen. It has never  
17      happened. We don't have any law saying that is the  
18      definition for "Permanent Total Disability." Even  
19      if it were, I think the argument would be, maybe  
20      you could use that definition, if you want to have  
21      the Jury determine if this child was disabled, but  
22      they still need to be the trier of fact and  
23      determine whether, you can't just come in and state  
24      the ultimate fact. That is our argument. We don't  
25      want argument or testimony or evidence to this Jury

1 saying the child is disabled and the Social  
2 Security Administration, the Government, has  
3 already determined that to be so.

4 THE COURT: Thank you.

5 MR. MOSHER: Good morning, your Honor.

6 Just as a quick aside, this is the parents'  
7 only opportunity to come up here and come before  
8 the court and this is their time they are asking  
9 for pain and suffering for their filial consortium.  
10 In order to do that under Florida law, you have to  
11 show the child has a permanent disability.

12 Obviously, in this instance we have a determination  
13 by the Social Security Administration, a Federal  
14 agency, that the child is permanently disabled.

15 THE COURT: How are you going to get that in?

16 MR. MOSHER: Well, your Honor, what about  
17 direct testimony? This is a fact that happened.

18 We will put the Mom on the stand, "Does your child  
19 receive Social Security Disability benefits?" "Yes,  
20 he does." "Why does he receive those benefits?"

21 A. "Oh, well he was determined permanently  
22 disabled."

23 THE COURT: "Objection, hearsay."

24 MR. MOSHER: Right, it is not hearsay, your  
25 Honor, it is a fact, it is a determination that has

1           been made.

2           THE COURT: I don't know. It sounds like  
3           hearsay 101 to me.

4           MR. MOSHER: Well, your Honor, it is the same  
5           as, "Is your son in a wheelchair?" "Yes, he is."  
6           "Why is that?" "He broke his leg." "Who told you  
7           that?" "The doctor did."

8           THE COURT: I'm not sure about a broken leg,  
9           what it involves is medical testimony or argument  
10          that very well may be hearsay at the time. It is  
11          an out-of-court statement, it is what somebody  
12          said, somebody in the Social Security  
13          Administration or people within the Social Security  
14          Administration said. It is an opinion that they  
15          derived, so it is an out-of-court statement,  
16          admitted for the truth of the matter, being the  
17          child has been disabled, nobody is obviously  
18          testifying from the Social Security Administration  
19          in court, not that I'm aware of. How are you going  
20          to get over the hearsay objection?

21           MR. MOSHER: Well, the Florida courts, nobody  
22          adopted this and said this is the standard we are  
23          going to use, the Social Security Administration,  
24          Opposing Counsel is right on that, but this is  
25          Middle District Court in Florida applying Florida

1 law, saying this is how we anticipate Florida is  
2 going to do it as opposed to adopting a New Jersey  
3 standard from a different court, and they are  
4 saying we are going to use the Social Security  
5 Administration's determination as our definition.

6 THE COURT: It is Federal law, whether it is  
7 New Jersey or here. It is the same Social Security  
8 Administration, right?

9 MR. MOSHER: Sure, when the Florida courts say  
10 "we are going to adopt this determination," that  
11 means our definition for Permanent Disability for a  
12 child, as a prerequisite to filial consortium, if  
13 we say the definition for "Permanent Disability" is  
14 the same as the Social Security awards, if you meet  
15 it for one, you meet it for the other, that is  
16 direct evidence.

17 THE COURT: I'm not persuaded. I'm going to  
18 grant the motion. One, I'm not sure you can get it  
19 in evidentiary-wise, and see if you can overcome  
20 the hearsay hurdle. I have not read it in  
21 entirety, the New Jersey opinion, but I read the  
22 excerpt that is provided here. I think their  
23 reasoning and rational applies here, this being  
24 Florida and New Jersey. I'm going to grant that  
25 motion.

1                   MR. MOSHER: Quickly. They are bringing in  
2                   the IME. Their report saying he's not disabled, he  
3                   will not have problems in the future. This is the  
4                   evidence we have that is in opposition to that.  
5                   This is our chance to balance the scale.

6                   THE COURT: They had an IME doctor, somebody  
7                   else making an examination, that person is giving  
8                   their opinion. If you have someone else that will  
9                   give an opinion coming into court based on an  
10                  examination, I assume that person could give their  
11                  opinion, as well, right? You are asking some  
12                  Federal Government on a document making a  
13                  determination outside of this proceeding, nothing  
14                  is admissible, and I don't think it is appropriate.  
15                  If Florida adopts the standard, maybe we will  
16                  address it.

17                  MR. MOSHER: It is a Federal agency, that is  
18                  the type of ruling that courts are absolutely  
19                  allowed to take judicial notice of, given it is a  
20                  Federal agency, it is the type of thing the Court  
21                  should take judicial notice of.

22                  THE COURT: You are slugging after the bell. I  
23                  think I made my ruling.

24                  Moving on.

25                  Next one?

1 MS. KREIZINGER: Your Honor, there are some  
2 motions filed by the Hospital, and also by us, that  
3 I don't know if you have copies of.

4 THE COURT: I don't, at least I don't think  
5 so.

6 MS. KREIZINGER: Do you have any more?

7 MR. COMRAS: We have one causally related to  
8 things that are your Motion In Limine, and that is  
9 whether the Affordable Care Act is something we can  
10 discuss.

11 MS. KREIZINGER: Last night they filed after  
12 6:00 a Motion In Limine, I'm absolutely in no  
13 position to argue it.

14 MR. COMRAS: It is not a Motion in Limine.

15 MS. KRUSBE: It is titled a "Motion In  
16 Limine."

17 THE COURT: How can she argue something she  
18 just got notice of? It is a long trial, we can  
19 break and argue if you want to do it at that point.

20 MS. KREIZINGER: Your Honor --

21 MR. LEA: If I can go next, I will be short?

22 THE COURT: Okay, with that promise, you can  
23 go next.

24 MR. LEA: May I approach?

25 THE COURT: Sure.

1                   MR. LEA: I don't know if you have these  
2 Motions In Limine. It is Dr. Berto Lopez and his  
3 PA. I talked to Plaintiffs' Counsel, we agreed to  
4 every single one of them except for two. There are  
5 ten Motions In Limine. The one we have not agreed  
6 to, is No. 8, that is the first one, we are not in  
7 agreement with.

8                   Judge, that simply says as a matter of law,  
9 Plaintiffs will never have to pay the difference  
10 paid by the healthcare providers, in the amount any  
11 provider may accept for Medicaid, Medicare or a  
12 third-party insured. That is black-letter law.  
13 There's some sort of contract that Dr. Grossman, in  
14 this case, came up before, has with his patients  
15 that says, "No, I require the difference between  
16 that." I don't even know if that is legal, but  
17 they are going to try to introduce evidence that if  
18 we are found liable, that that is a damage that  
19 they will have to make up for, because it is over  
20 and above what Medicare and Medicaid would pay.

21                  THE COURT: Is this a collateral source  
22 argument?

23                  MR. LEA: I don't think they are allowed to do  
24 it, but Counsel has a different opinion.

25                  THE COURT: Wasn't there just an opinion that

1           came out yesterday dealing with Medicare and  
2           collateral sources, it came out yesterday?

3           MS. KREIZINGER: I didn't read it.

4           THE COURT: I saw the headnote.

5           MS. KRUSBE: I have a copy of that case, your  
6           Honor, it ties into our Affordable Care Act  
7           argument.

8           MS. KREIZINGER: I don't think that is part of  
9           the argument we are having now.

10          THE COURT: Is it germane to this argument?

11          MS. KREIZINGER: I don't think so. We have a  
12         situation where this child was on Medicaid. Dr.  
13         Brown has a separate contract with the Plaintiff  
14         that if they receive any monies, he actually gets,  
15         by contract, the outstanding balance that was not  
16         paid by Medicaid. He normally charges around  
17         \$80,000 for this massive surgery on the spine.

18          Medicaid pays him a small amount. He has a  
19         separate contract, it is not a Letter of  
20         Protection, and he has no contract with Medicaid or  
21         healthcare providers, and he actually by contract  
22         asked for the remaining balance of his bill, if in  
23         fact the Plaintiff proceeds. It is not a Letter of  
24         Protection, it is his own contract. I think we are  
25         entitled to put the entire amount of the bill in.

1           We can explain to them, you know, "This was paid  
2           this amount and Dr. Grossman has a balance in this  
3           amount." It is by contract. It is not a Letter of  
4           Protection. It is not outside of the scope of what  
5           he cannot do. He has a lawyer that drafts this  
6           contract that the client signed. I don't want to  
7           go into court and not be able to ask for the full  
8           amount to the Jury of whatever that full balance  
9           is.

10           THE COURT: There's a danger of double  
11           recovery here?

12           MR. LEA: Yes. Your Honor, I don't think he  
13           can contract away what the Federal rules say about  
14           Medicaid. If he is a provider, he's accepting  
15           Medicaid, he can't balance bill. He is coming up  
16           with his own contract saying, "I'm entitled to the  
17           difference." I don't think he can do that. I  
18           don't think he's ever been challenged enough in  
19           court, probably, to invalidate that contract. Your  
20           Honor, if he's a provider accepting Medicaid and  
21           Medicare, he has to abide by the Rules. He can't  
22           say, "I don't care, I have my own separate  
23           contract." That is not the way it should work.

24           THE COURT: What about that? Otherwise,  
25           everybody can contract away like this doctor did.

1                   MS. KREIZINGER: He doesn't have a contract,  
2                   he was asked in his deposition, which was taken  
3                   back on February 2, 2015, Page 21, he was asked a  
4                   question:

5                   **Q. "When you make an agreement with an insurance**  
6                   **company, do you not agree to accept what is that the**  
7                   **insurance company pays in lieu of seeking additional**  
8                   **sums from the patient?"**

9                   A. "No, I don't."

10                  **Q. "And in a patient such as Matthew Dixson, who**  
11                  **a Medicaid recipient, your belief is that you can**  
12                  **collect not only from Medicaid but also charge the full**  
13                  **amount of the surgery?"**

14                  A. "Well, it is a private insurance company. It  
15                  is United Health Care. They make a business agreement  
16                  with me on how much they are willing to pay for the  
17                  surgery, with no stipulation I can't collect from a  
18                  third-party."

19                  **Q. "You believe in addition to any sort of copay**  
20                  **you are entitled to seek the balance of whatever surgery**  
21                  **is after you have been paid by insurance?"**

22                  A. "Yes."

23                  MR. LEA: I believe that is illegal, Judge, he  
24                  is balance billing, he is not allowed to do that.

25                  THE COURT: I'm not saying it is illegal, but

1 somewhat unusual.

2 MS. KREIZINGER: I think it is unusual to all  
3 of us, Judge, but he has a contract, he has a  
4 lawyer that draws it up, this is what he does. I  
5 don't want to miss the opportunity to not ask the  
6 Jury for that amount. They can go after him on  
7 cross-examination and say, "Hey, you're balance  
8 billing," and those things, but that is what he  
9 does.

10 MR. LEA: Judge, if I can approach? I was  
11 handed the ThyssenKrupp Elevator case, a Fourth  
12 District case. (Handing.) I direct your Honor's  
13 attention to this last paragraph, which is where it  
14 says "Allowing the admission of evidence of the  
15 excess discharge by Medicare payment, has the  
16 effect of providing an underserved windfall to the  
17 Plaintiff," and quotes Stanley 452 So.2d at 515.

18 THE COURT: So your position is your client  
19 would be that when the smoke clears at the end of  
20 this trial, a good doctor can come after your  
21 client for the difference?

22 MS. KREIZINGER: Absolutely Judge. That is  
23 why I need an opportunity to ask for it at the time  
24 of the trial if we get awarded an amount.

25 MR. LEA: She can use the case law and say you

1       are not entitled to it. It shouldn't have to be  
2       presented to a jury that this is the way he bills,  
3       and there's a contract, and he's entitled to the  
4       difference, if he's really not entitled to the  
5       difference.

6             THE COURT: Like I said, does the Federal  
7       Government permit that kind of billing?

8             MS. KREIZINGER: You know, Judge, because he  
9       has a separate contract and he's not under contract  
10      directly with United Health Care, he explained  
11      that, "I'm not under contract." We will discuss  
12      how much the bill is, they will pay, then I balance  
13      bill for the remainder. I think under the Federal  
14      Government, you have to have a signed agreement  
15      with the healthcare provider that specifically  
16      says, "You take what we give you, and that's it.  
17      You are entitled to nothing else."

18            THE COURT: That is a quit pro quo: "We are  
19      going to pay you, but we are going to pay you under  
20      these circumstances."

21            Right?

22            MS. KREIZINGER: Yes.

23            THE COURT: Or reimburse you under these  
24      circumstances? Was that a distinction without a  
25      difference in your view?

1                   MR. LEA: Yes, because it is United Health  
2                   Care policy, isn't it through Medicare or Medicaid,  
3                   her policy?

4                   MS. KREIZINGER: Yes.

5                   MR. LEA: That is a Federal -- they are  
6                   accepting Federal payments, she's calling it  
7                   "United Health Care," really it is Medicare. They  
8                   are accepting Federal payments. They have to abide  
9                   by the Rules. If you accept payments from a  
10                  Federal entity, you cannot balance bill. It has  
11                  never been allowed, whether he has a contract or  
12                  not.

13                  THE COURT: That is my understanding, but I  
14                  never had this, nobody has.

15                  MS. KREIZINGER: It is new for us, too. I  
16                  don't want to lose the opportunity to ask for those  
17                  monies, if in fact, we get an award, we will have  
18                  to pay that balance out of the proceeds. It is a  
19                  prejudice to the Plaintiff if we don't get an  
20                  opportunity to ask for it. They can impeach him on  
21                  it.

22                  MR. LEA: Judge, it would be as if your Honor  
23                  would say, "I know you can't balance bill, but for  
24                  the purpose of this particular trial, I'm going to  
25                  allow the Plaintiff to ask for the balance bill

1           damages that Dr. Grossman has under a contract,  
2           which is probably illegal."

3           THE COURT: I see the point, though, if in  
4           fact the Doctor did sue your client out of the  
5           proceeds, then that issue would have to be  
6           litigated, I suppose, whether or not, in fact, that  
7           was a legal contractor not. I might want to give  
8           this a little more thought. My initial reaction,  
9           sounds to me that it is contrary to law, but I'm  
10          not an expert on that. I'm not fully prepared to  
11          say that yet.

12          MS. KREIZINGER: All right.

13          THE COURT: So, let me take another look,  
14          think about it some more. I'm sure by the time  
15          this issue comes up, if we need to revisit it, we  
16          can revisit it again.

17          MR. LEA: In that motion, Judge, I quoted  
18          ThyssenKrupp, I quoted Dorato versus Ford Motor  
19          Company. All of the other cases you need to make  
20          that decision are contained.

21          THE COURT: None of them involved this  
22          situation, where somebody had a separate contract  
23          with the patient.

24          What is the other one?

25          MR. LEA: 10, your Honor.

1           I gave you a copy of the Florida Statute on  
2 physician assistance, which is the blue document  
3 below the Motion in Limine.

4           THE COURT: Yes.

5           MR. LEA: If you look down to Subsection 2(f),  
6 it talks about supervision of what is expected of  
7 the physician on how he should supervise the  
8 physician assistant. "Supervision" means  
9 "responsible supervision and control except in  
10 cases of emergency, supervision requires the easy  
11 availability or physical presence of the licensed  
12 physician for consultation, direction of the  
13 actions of the physician assistant."

14           In this particular case, the physician  
15 assistant saw the patient, made the notes on  
16 Charisse Matthews for every single one of her  
17 visits. There's been testimony from Cecelia  
18 Bustamante, who is the physician assistant, that  
19 Dr. Lopez was around, easily available. He  
20 satisfies the requirements of the statute. He's  
21 under easy availability or physical presence.

22           THE COURT: What is being asked?

23           MR. LEA: The Motion In Limine, because of the  
24 fact that they have an expert, Dr. Bottiglieri, who  
25 said, "No, no, no. You can't do that. If just the

1 physician assistant sees the patient, it is  
2 negligence." That is not true. Under the statute,  
3 as long as they fulfill the requirements of the  
4 statute, Dr. Bottiglieri can't say they are  
5 negligent. Under Florida law, a physician  
6 assistant is allowed to see a patient all of the  
7 time. Dr. Bottiglieri is saying, "No, this  
8 physician, Dr. Lopez, needed to come in and see her  
9 at least once or twice or whatever, and in fact,  
10 she misses an appointment when he was going to see  
11 her, one of the last scheduled appointments.

12 THE COURT: Is this different from a nurse  
13 practitioner?

14 MS. KREIZINGER: Yes, it is, much different,  
15 Judge.

16 MR. LEA: Under the statute, they can't claim  
17 that Dr. Lopez should have come in and therefore,  
18 he was negligent, if in fact, he was fulfilling the  
19 requirements of the statute. His PA was fulfilling  
20 the requirements of the statute. There was nothing  
21 they did that was not sanctioned by the statute.

22 THE COURT: It is like I'm being asked --

23 MS. KREIZINGER: Your Honor, if I may respond?

24 THE COURT: Yes.

25 MS. KREIZINGER: Charisse Matthews, my client,

1 was a high risk pregnancy. She had gained  
2 excessive weight, 50 to 60 pounds. She was  
3 borderline gestational diabetic. She was advanced  
4 maternal age. She had large babies previously.  
5 She is what is considered a high-risk pregnancy. A  
6 high-risk pregnancy patient cannot even be seen by  
7 a midwife, and a midwife is above a PA, a PA is  
8 just being supervised. Our position that Dr.  
9 Bottiglieri testified in his deposition that this  
10 patient needed to be seen by the OB who never saw  
11 her the entire pregnancy, never put his hands on  
12 her. The only person that saw her was a PA, a  
13 physician assistant, who is way below a midwife. A  
14 midwife can't even see a high risk. His criticism  
15 in his deposition on page 23, starting on Page 231,  
16 line 24:

17 Q. "So did he," (meaning Dr. Lopez) "fall below  
18 the accepted standard of care by failing to actually  
19 treat himself, put his hands on and examine this high  
20 risk patient?"

21 **The answer by my OB expert:**

22 A. "Yes, the patient should not have been  
23 followed through her entire pregnancy by only a PA. That  
24 is a violation, of course it is."

25 THE COURT: Violation of what?

1 MS. KREIZINGER: Standard of care. Yes.

2 The statute says, "Hey, you want a physician  
3 assistant who is not an RN or LPN, you want a  
4 physician assistant, Doc, you have to supervisor  
5 that patient.

6 In this case, my expert is saying, "Wait a  
7 minute. You have a high risk patient. You never  
8 put your hands on the patient. You had a  
9 physician's assistant seeing her. That is below  
10 the standard of care. She's high risk. You, Doc,  
11 should have been seeing her."

12 That is our position, and that is what he  
13 testified to, that this was below the standard of  
14 care of him never seeing this patient and only  
15 allowing a PA only to care for the patient.

16 THE COURT: I grant it. I will deny the  
17 Motion In Limine.

18 Anything else for me?

19 MR. LEA: Thank you, Judge.

20 MR. WEBBER: Your Honor, I have a couple, I  
21 think, standard Motions In Limine.

22 THE COURT: Boilerplate?

23 MR. WEBBER: Yes, with one exception. The  
24 first one is --

25 THE COURT: I don't want to go over the

1           boilerplate ones, unless Counsel feels it is  
2           something that you may have to revoke.

3           MS. KREIZINGER: We have a couple of motions,  
4           but more specifically, we had filed a motion to  
5           strike the Defendant's --

6           MR. WEBBER: Wait, I think he wants to finish  
7           up.

8           THE COURT: I think I actually read that  
9           motion. Let's finish up on this side of the table.

10          MR. WEBBER: The Motion in Limine regarding  
11           bolstering.

12          MS. KREIZINGER: We are in agreement, no  
13           bolstering.

14          MR. WEBBER: Can't mention "insurance."

15          MS. KREIZINGER: Absolutely agree.

16          MR. WEBBER: Experts can't talk about  
17           "negligence," use the word "negligence."

18          MS. KREIZINGER: I have a problem with that.  
19          We have to argue that one. If they can't use the  
20           word "negligence," if they are an expert, they  
21           can't say the word "negligence," which means falls  
22           below the accepted standard of care.

23          MR. WEBBER: I think there's a difference  
24           there, your Honor. The determination of negligence  
25           falls into the purview of the Jury. They can say

1 something was below the standard of care, doesn't  
2 necessarily mean it was negligent. That is a  
3 determination the Jury should be making.

4 THE COURT: What does the case law say? I'm  
5 sure that issue has come up.

6 MR. WEBBER: Yes, Smith versus Martin, Fourth  
7 DCA, the Appellate Court reversed because the  
8 expert testified that, "The conduct of the  
9 Defendant amounted to gross negligence. This  
10 caused the Jury to forgo independent analysis of  
11 the fact and was particularly likely to influence  
12 the Jury's decision."

13 THE COURT: So the expert can't give an  
14 opinion as to the ultimate issue?

15 MR. WEBBER: He can't say "negligence," that  
16 is the ultimate issue the Jury has to determine.  
17 That is a factual determination. He can say he  
18 fell below the standard of care. She can argue  
19 falling below the standard of care is negligence,  
20 but it will negatively influence the Jury.

21 MS. KREIZINGER: Your Honor, what Opposing  
22 Counsel wants us to do is nobody can use the word  
23 "negligence." "Negligence" is defined, and it is a  
24 jury instruction that if a physician fell below the  
25 standard of care. People use "negligence" as a

1 simple understanding of "it is below the standard  
2 of care." He wants to stop us from using a  
3 specific word, and all of the experts have  
4 mentioned the word "negligence." They will say,  
5 "Dr. Lopez was negligent when he did A, B and C.  
6 He fell below the standard of care." I think it  
7 puts a limit on using the word "negligence" is  
8 highly prejudicial. I don't think there's any case  
9 law on it. The case Opposing Counsel is talking  
10 about is if you put someone on the stand, and they  
11 are a lay witness, and you say to them, "Is Dr.  
12 Lopez negligent?" And they are not an expert, they  
13 absolutely can't testify to that ultimate fact.  
14 But under the Rules of evidence, experts are  
15 allowed to testify to that ultimate fact.

16 THE COURT: That is my general understanding,  
17 talking about experts, that they can testify to the  
18 ultimate fact.

19 MS. KREIZINGER: Absolutely.

20 THE COURT: In the case you gave me, was that  
21 a lay witness?

22 MR. WEBBER: That was an expert, your Honor.

23 THE COURT: Let me take a look at it. What is  
24 the date?

25 MR. WEBBER: That is a 1998 case. The term

1           "negligence," "negligent," appears on the Verdict  
2         Form.

3           MS. KREIZINGER: Um-huh.

4           MR. WEBBER: The Jury has to make the  
5         determination, they have to put everything  
6         together. Just allowing an expert giving credence  
7         by calling him an "expert," saying they are  
8         negligent, you are short-circuiting the Jury's  
9         responsibilities.

10          THE COURT: And the only case that addresses  
11         this in the whole history of Florida juris prudence  
12         is that one case?

13          MS. KREIZINGER: That is on gross negligence.  
14         I can't bring in my expert, and ask him one  
15         question, "Was Dr. Lopez negligent?" He has to  
16         have his opinion as to the basis and he has to set  
17         it. "This is the basis for it and that is  
18         negligence." They want to prohibit any expert from  
19         using the magic word "negligence" for some reason,  
20         and it is a word we have to say in front of the  
21         Jury. They have to understand what the word means,  
22         it is in the jury instructions, and they have to  
23         answer the question on the verdict form that says,  
24         "Did Dr. So-and-so fall below the accepted standard  
25         of care?" Because that is negligence.

1                   MR. WEBBER: "Negligence" has a specific legal  
2 meaning. The experts in medical evidence, by  
3 testifying to something being negligent, they are  
4 making a legal conclusion that they are not  
5 qualified to make as a medical expert.

6                   THE COURT: I think you all need to go back  
7 and do your homework. There are cases there, I  
8 know, besides the one case. I know this issue has  
9 come up before. I looked at it, also.

10                  My general feeling is, if you had not shown me  
11 that case, they are perfectly able to do, the  
12 expert is permitted, I think that is the law, I may  
13 be wrong. I'll do my homework. You do yours. If  
14 you can find me something else, I will be happy to  
15 take a look at it.

16                  Right now, my ruling, if I had to make it, I  
17 would allow the testimony.

18                  MS. KREIZINGER: Okay.

19                  MR. WEBBER: Then the last -- Loreen, I don't  
20 know if you made the decision of the attendance of  
21 the minor at trial?

22                  MS. KREIZINGER: Tell me your motion. I'll  
23 explain my argument.

24                  MR. WEBBER: We would like to have the minor  
25 child, he's turning four in a couple of weeks, at

1           least appear at trial for some period of time, so  
2           the Jury can see him, make their own evaluation,  
3           they will hear testimony from the experts,  
4           testimony from the treaters about his condition. I  
5           believe they will be aided in their evaluation.

6           THE COURT: The Plaintiff?

7           MS. KREIZINGER: The minor child?

8           MR. WEBBER: Yes. We are not calling him up  
9           to testify. We don't expect him to sit for the  
10          whole trial, but we believe his appearance is  
11          appropriate at some point in trial.

12          THE COURT: How does this work? "Hey, Members  
13          of the Jury, sitting over here is the minor child."

14          How is the Jury going to know that this person  
15          is the person who was the minor child in question  
16          here? You are not calling him to testify, so are  
17          you going to have him stand up?

18          MR. COMRAS: Judge, can I also add into that?  
19          I join into the motion here. Whether we call him  
20          up or not, perhaps we do that. We understand he's  
21          four years old. He can't take an oath and swear to  
22          tell the truth, nothing but the whole truth, but I  
23          think when you are talking about a child and you  
24          have people testifying that the child can't move  
25          his arm, that the child can't lift his arm up, that

1           the child can't lift his arm to the side, and you  
2           have that child, and he can do all of those things.

3           THE COURT: Are you going to call this child  
4           up and have him do handstands.

5           MR. COMRAS: Nothing like that, obviously, we  
6           want to have the child present, so the Jury can,  
7           one, evaluate and see the child.

8           THE COURT: Lift his arm, though?

9           MR. COMRAS: I don't think we have to ask him,  
10          he's a four-year old child, he is going to be doing  
11          all of those things anyway.

12          THE COURT: How is that appropriate? The Jury  
13          just sees him sitting there? They can't tell by  
14          him sitting there, whether he can lift his arms or  
15          do any of the things testified that he can or can't  
16          do, unless you have him come in the well of the  
17          Court and do those things. How is it going to be  
18          probative?

19          MS. KREIZINGER: It is not going to be  
20          probative.

21          THE COURT: Let him answer.

22          MR. COMRAS: I think if we have the  
23          opportunity as to whether or not he can raise his  
24          arm.

25          THE COURT: Do you want to call him to

1 testify?

2 MR. COMRAS: Not to testify, but demonstrate  
3 what he can do, yes, Judge.

4 THE COURT: If you ask him to lift his arm,  
5 that is testifying.

6 MR. COMRAS: I would ask him, can you please  
7 lift your arm up for us?

8 THE COURT: I guess, I'm thinking in my mind  
9 all of the bad things that can happen for both  
10 sides. As soon as he lifts his arm and says, "Oh  
11 my God." I don't know.

12 MR. COMRAS: We want the option, if it is  
13 available. I think it is important for the Jury to  
14 see how the child is doing, rather than to hear one  
15 side say he's completely totally disabled and the  
16 other side say he's not totally disabled, he can do  
17 all of the things a normal kid can do.

18 THE COURT: The other question I have is: Is  
19 he under subpoena?

20 MR. COMRAS: I think we can get that  
21 accomplished.

22 THE COURT: He is not now. Is he on the  
23 witness list?

24 MR. COMRAS: I believe so.

25 MS. KREIZINGER: If I may respond? This child

1 has been through an enormous amount. He's been  
2 through numerous surgeries. They had an  
3 opportunity to examine him, they are going to bring  
4 a doctor in. Our surgeon is coming in, our physical  
5 therapist is coming in, they will be going through  
6 his limitations. The parents are absolutely  
7 against bringing the child into the courtroom.  
8 They don't want anymore fear in this child. They  
9 are very concerned. The child is now biting his  
10 arm, his bad arm. That is how he deals with it.  
11 We will bring in photographs, video, they can see  
12 him. They already have an expert, we have an  
13 expert, to bring the child in like a circus, the  
14 parents are very adamant.

15 THE COURT: Assuming he was under subpoena and  
16 he is on the Witness list, what is the legal reason  
17 for not allowing him to appear or to be called?

18 MS. KREIZINGER: First of all, your Honor,  
19 he's three years old. I don't think you can  
20 subpoena three-year-old to come to trial.

21 THE COURT: I don't think it is a specific age  
22 cap. Age is a factor and there are a number of  
23 other factors would be considered if a witness of  
24 this age should be called to testify. There is not  
25 a per se rule that a four-year old can't testify.

1 MS. KREIZINGER: Yes, that is why we are going  
2 to use photographs, video. They have an expert  
3 that examined him. We have a surgeon that examined  
4 him. We have a physical therapist. The child is in  
5 therapy for every week and has been for the last  
6 three years. I can't control what is going to  
7 happen in the courtroom with this child. I don't  
8 know his tolerance. I know his parents are very  
9 adamant, they don't want him here. I think they  
10 have every right to say they don't want to parade  
11 this child into the courtroom. They are his legal  
12 guardian, he is a minor. They have great concern.  
13 I understand that. If something goes wrong, and  
14 causes another issue to come up, I don't want that  
15 to go against my case. I don't want the prejudice  
16 that could happen.

17 THE WITNESS: I don't think it is prejudice,  
18 it may be on the other side for calling a four-year  
19 old child.

20 MR. WEBBER: Your Honor, the motion is  
21 obviously the alternative to subpoenaing him and  
22 having him come when we want him as opposed to any  
23 other circumstances. But if the Court wants us to  
24 subpoena him and then make the determination, we  
25 can do that, as well.

1                   THE COURT: I think it is a moot point until  
2 he is under subpoena. Once he's under subpoena and  
3 you still want to parade him in front of this Jury,  
4 I'll make the determination at that point.

5                   MR. COMRAS: The only thing I want to bring up  
6 to that is we asked if there were videos of the  
7 child that they would be using at the time of  
8 trial. As of last week, they indicated none. Now,  
9 I'm hearing they have video. My concern is, I had  
10 an IME doctor, he was unable to take pictures or  
11 videos. Ms. Kreizinger would not allow either.  
12 I'm prejudiced in that sense, if they are going to  
13 allow video to come in at this point.

14                  THE COURT: Are you going to use video?

15                  MS. KREIZINGER: Yes, your Honor. We have an  
16 exchange of exhibits to show whatever we are going  
17 to use next Wednesday. All Counsel agreed at 2  
18 o'clock, that whatever they have in terms of  
19 exhibits going to be exchanged and shown.

20                  MR. COMRAS: As of last week, the problem is,  
21 we asked if there were any videos, asking for  
22 copies of all of the records.

23                  THE COURT: As far as the videos, can you let  
24 them know today?

25                  MS. KREIZINGER: Yes, I will, Judge.

1                   MR. WEBBER: Can we also get copies of the  
2                   videos?

3                   MS. KREIZINGER: Sure.

4                   THE COURT: I didn't rule on whether or not if  
5                   this witness is subpoenaed, if the Witness will be  
6                   called to testify or make an appearance  
7                   demonstration, I don't know yet. We will cross  
8                   that bridge if and when.

9                   MS. KREIZINGER: Plaintiff has a couple of  
10                  motions for the Court to consider.

11                  THE COURT: It is past the hour.

12                  MS. KREIZINGER: Okay, your Honor. Probably  
13                  the most significant issue at this point is is we  
14                  did file a motion to strike.

15                  THE COURT: The economics expert?

16                  MS. KREIZINGER: The economics expert that was  
17                  just listed ten days ago. I don't have an  
18                  economist. The Rules are clear in terms if they  
19                  get an expert, I get an expert, but now, we are on  
20                  the eve of trial. This is one of those Binger  
21                  situations, where I'm in an ambush situation. They  
22                  apparently want to use an economist to talk about  
23                  present value, which we no longer use "present  
24                  value" on the verdict form or in the Jury  
25                  instructions. So now, if the Court allows them, I

1 have to get an economist so we have balance here.  
2 I think it is total ambush. We paid experts to  
3 come to trial on the 27th an enormous amount of  
4 money we up-fronted. We have a number of them  
5 coming out. I don't want a continuance in this  
6 case. I want to try the case on the 27th. I think  
7 for them to come in at the last minute, you know,  
8 this is the third time to be ready for trial. We  
9 have been rolled two other times. Experts were  
10 supposed to be disclosed 90 days before trial,  
11 which was three months ago, and on the eve of  
12 trial, they pulled this. I have a huge problem. I  
13 think it is prejudicial if it is allowed. I think  
14 their expert should be stricken.

15 THE COURT: It is a tall hill to climb on this  
16 one. Go ahead.

17 MR. COMRAS: We disclosed Dr. Durham 25 days  
18 before trial, we disclosed him on October 2nd.  
19 What I can tell you, your Honor, this is what we  
20 consider to be one of the shortest depositions that  
21 would take place in this case altogether. The only  
22 purpose for the economist is to come in and testify  
23 about the present value of their life care plan.  
24 They have a life care plan, they can discuss the  
25 present value of their life care plan. I think we

1       are entitled to do so. I think the Jury  
2       instructions indicate any award in a life care plan  
3       has to be --

4                  THE COURT: -- this life care plan was not  
5       sprung on you yesterday? Why wasn't the Witness  
6       timely disclosed? Obviously at some point in time,  
7       you realized, "Gee, we are going to need an  
8       economist here and ask the Jury to reduce this to  
9       present value, why wait until we are well past the  
10      disclosure deadline?

11                 MR. COMRAS: Judge, the last order that I saw  
12      didn't provide disclosure deadlines. We were going  
13      to meet and discuss when our experts and exhibits  
14      would be re-disclosed. I have seen a flurry of new  
15      amended witness lists and new exhibit lists and so  
16      on.

17                 THE COURT: The fact is they don't have an  
18      economist. Am I to continue the trial again to  
19      allow them to get an economist?

20                 MR. COMRAS: I don't think an economist would  
21      be difficult to get between now and trial.

22                 MS. KREIZINGER: Your Honor, I am absolutely  
23      in no position to find an economist, take their  
24      economist, be prepared. We are going to New York  
25      on Tuesday, because Mr. Gordon Lea's expert, his OB

1 expert can't testify at trial. We are going up to  
2 New York on Tuesday, doing a video deposition for a  
3 trial. I absolutely have no time to get an  
4 economist. It is prejudicial. I don't want a  
5 continuance. We are ready to go. It is going to  
6 be highly prejudicial to the Plaintiff, because we  
7 had to shell out all of the costs for the experts.  
8 Now, on the eve of trial, he's trying to bring in a  
9 new one. You said we had to go back to the prior  
10 trial, the deadline says 90 days prior to trial,  
11 experts have to be disclosed, and it wasn't  
12 disclosed. They violated the trial order to stop  
13 these kind of things from happening.

14 THE COURT: I agree. I'm going to grant the  
15 Motion to Strike. The wait listing of this expert  
16 is clearly prejudicial to the Plaintiffs' side,  
17 requiring them to go out now and get a new expert  
18 on the eve of trial is asking too much.

19 I'll grant the motion.

20 MS. KREIZINGER: Your Honor, the Plaintiffs'  
21 next motion is the Defendants in pretrial listed  
22 three experts for their standard of care nursing  
23 experts. They have two OBs and they have a nurse.  
24 We went in front of Judge Blanc in January, he made  
25 it clear, they could have two experts for the

1 standard of care. The understanding was I would  
2 pay for the first one, they would pay for the  
3 second one. We took Dr. Chauhan's deposition out  
4 in Texas, that was standard of care nursing. I  
5 paid for that deposition. Then they took Dr.  
6 Graham at John Hopkins, that is the second standard  
7 of care nursing, and they also talked about the OB  
8 standard of care. They paid for the second one.  
9 Now, they want to go and do a deposition by video  
10 next week of the third nurse expert who is a nurse.  
11 They want to go to Rhode Island next week and add  
12 this person in as their third standard of care  
13 nursing expert at the last minute, and I think it  
14 is absolutely prejudicial. I got notice yesterday  
15 from them -- "Oh, by the way, we want to go to  
16 Rhode Island, and we want to take this third  
17 standard of care nursing expert in Rhode Island."  
18 We object to.

19 THE COURT: Is this situation similar to the  
20 economist one? When was this witness disclosed?

21 MS. KREIZINGER: This witness was disclosed, I  
22 have the transcript, Judge Blanc specifically said  
23 you get two experts. I have the testimony from Dr.  
24 Chauhan, which was out in Texas. I asked him  
25 specifically, March 23, 2015: "Are you rendering

1 any standard opinions as to relates to Dr. Brown?"

2 "No. No one has asked me." "Your opinions are only  
3 as it relates to the nurses?" "That is what I was  
4 asked to do."

5 He's standard of care for nurses. Then we do  
6 the deposition of Dr. Grand. This is on March 24,

7 2015. Mr. Sawran asked at the end of the  
8 deposition to make it short for the Court:

9 Q. **"Dr. Graham, is it your opinion that within a**  
10 **reasonable degree of medical probability and based on**  
11 **your education, background, training, experience as an**  
12 **obstetrician, that the care and treatment rendered by**  
13 **the nursing staff and Dr. Brown and the others involved**  
14 **in the care of this patient met what you would consider**  
15 **to be an appropriate standard of care in obstetrics?"**

16 A. "Yes. I mean, I think the standard of care  
17 was met by the nurses and the doctors."

18 That is their second nursing standard of care  
19 expert. They had two. I paid for one, they paid for  
20 the other. Now, they are trying to come in the backdoor  
21 and use a third one, which I object to. It is a  
22 complete violation of what Judge Blanc said when we had  
23 the initial hearing on this.

24 MR. WEBBER: First of all, I totally disagree  
25 with what Plaintiffs' Counsel represented Judge

1       Blanc said. In fact, what Judge Blanc said is, "So  
2       I don't give you a bad ruling, because I'm  
3       confused, I will put you on call for a 15- or 30-  
4       minute hearing. Remind me of that." Counsel never  
5       called up a motion. After this hearing, she set  
6       our nurse expert for a deposition, which she then  
7       cancelled the day before. After she had made this,  
8       these arguments, and then still gone forward and  
9       set forth our expert witness's deposition.

10           THE COURT: How many standard of care experts  
11       on nursing do you intend to call?

12           MR. WEBBER: Your Honor, we intend to call  
13       Nurse Sosa as a standard of care on the nursing  
14       issue. After this, she also got her own nurse to  
15       testify.

16           THE COURT: Are you going to call two  
17       witnesses on this? Three witnesses?

18           MR. WEBBER: We don't intend to have any  
19       cumulative expert testimony. We have noticed three  
20       experts; one nursing, two OBs. We are also  
21       responsible under Plaintiffs' theory for the  
22       vicarious liability of Dr. Brown. So one of the  
23       OBs will be testifying regarding that. The other  
24       OB will be testifying regarding causation of the  
25       injury, proper use of Pitocin, policies and

1 procedures, the need for estimated fetal weight.  
2 There will be no cumulative testimony. Plaintiffs'  
3 counsel had months, maybe years, or a year at this  
4 point, to take Nurse Sosa's deposition, which she  
5 knew, because she set the deposition. After she  
6 cancelled it, she never talked about it again,  
7 never asked for her to be presented.

8 THE COURT: What is on record as far as what  
9 Judge Blanc said? Is there anything more?

10 MR. WEBBER: No.

11 THE COURT: I thought I saw someone, maybe it  
12 was a different case.

13 MS. KREIZINGER: You saw my original motion to  
14 strike expert heard in January. Your Honor, the  
15 Judge said if you couldn't work it out between the  
16 parties, come back in front of us on calendar call.  
17 I took Dr. Chauhan's and Dr. Graham's standard of  
18 care nursing. I said to Mr. Sawran, who is lead  
19 Counsel in this case, "I'm not taking your nurse.  
20 You got two. You just used your two up. I'm not  
21 going to take the nurse." We had no idea that this  
22 nurse was even in question until I get a phone  
23 call, "Oh, by the way, we are going to take this  
24 nurse's deposition."

25 I asked them: "Are you planning on having

1 three standard of care?" The rule in Florida is  
2 you get one standard of care expert. Now, he just  
3 explained to you, he's bringing in three people;  
4 two OBs and now this nurse. I already got the  
5 standard of care on nursing from these two. They  
6 absolutely shouldn't be allowed to do the third.  
7 We are on the eve of trial. They are saying, "it  
8 is not cumulative." Well, guess what? I got one  
9 nurse and one OB, they got three. They two OBs on  
10 standard of care nursing and they want to add a  
11 nurse on standard of care nursing. Enough is  
12 enough. It is the eve of trial, they got two. I  
13 paid for one and they paid for one.

14 MR. WEBBER: To say it is the eve of trial, we  
15 never withdrew Nurse Sosa. She was on the Witness  
16 list numerous times.

17 THE COURT: Why wait until now to depose her?

18 MR. WEBBER: It is not our responsibility to  
19 depose her on expert, your Honor. We asked if they  
20 were available on Friday, we had scheduling issues,  
21 we resolved it so she'll be able to come live at  
22 trial, because at the time we asked her, she was  
23 not able to come live. We were going to try to  
24 take her testimony videotape for the use of trial  
25 on that Friday.

1                   THE COURT: Like the other motion that has  
2 come before me, it seems a lot is happening at the  
3 time that you should be getting ready for trial.  
4 Now everybody is running on the fly, taking  
5 depositions, that is why we have deadlines in these  
6 cases. My feeling is, you know, you should be held  
7 to the two. You can pick whatever two you want.  
8 If you want to pick this person's deposition, on  
9 your dime, then, and use that person and not one of  
10 the others, I will give you that opportunity, but  
11 you should be limited to two.)

12                  MS. KREIZINGER: Then, your Honor, if they are  
13 going to use her, I will need a quick discovery  
14 deposition before they call her at trial, but they  
15 will have to pay for that one. I understand you  
16 will limit it to two standard of care nursing  
17 experts, as opposed to the three they have listed.

18                  THE COURT: Right, they can choose which two  
19 of the three.

20                  MR. WEBBER: Okay.

21                  MS. KREIZINGER: Okay.

22                  THE COURT: Anything else?

23                  MR. WEBBER: I do have a quick scheduling  
24 question. Because as we have been, we have been  
25 discussing this case amongst the Counsel.

1                   THE COURT: Discussing settlement?

2                   MR. WEBBER: That has not come up so much.

3                   Sorry.

4                   The question has been raised, especially on  
5                   the Defense side, what would happen if we get to  
6                   the eighth day and not finished with trial, because  
7                   we are --

8                   THE COURT: I'm not going to mis-try after  
9                   eight days of trial.

10                  I'm not that mean.

11                  MR. WEBBER: What is your schedule? You would  
12                  not be unique if you decided to do that.

13                  THE COURT: Unless there's some extraordinary  
14                  circumstances. I think everybody should give their  
15                  best estimate of how long. It might take ten days,  
16                  but...

17                  MR. WEBBER: I think from the Defense side, we  
18                  think it is more likely to take ten days, than the  
19                  eight set aside. That would, if we still started  
20                  on Tuesday --

21                  THE COURT: It may cause disruption in terms  
22                  of, I don't know if we have holidays and stuff,  
23                  bringing the Jury back after a couple of days,  
24                  three days, I don't know, I'm not looking. If we  
25                  go eight days, I'm not going to mis-try the case.

1 MS. KREIZINGER: Your Honor, just as a side  
2 note on Friday November 6th, I ask if we could  
3 adjourn early if we are still in trial. I'm taking  
4 my daughter on a two-day cruise for her birthday.  
5 I have to be on a boat. I want to let everybody  
6 know, that Friday, I have to be in port in Fort  
7 Lauderdale.

8 THE COURT: Remind me, we can work with that.

9 MS. KREIZINGER: I think the other Motions In  
10 Limine are standard, the remaining ones we have?

11 MR. COMRAS: So I'm clear.

12 THE COURT: Sure.

13 MR. COMRAS: If we go eight days, it ends on  
14 Friday, if we leave early on Friday, would we  
15 reconvene the following week?

16 THE COURT: Yes, that would be my hope,  
17 without looking at the calendar.

18 MR. WEBBER: I think there's a holiday in the  
19 middle of that week.

20 THE COURT: Yes, I know I have some special  
21 sets.

22 MR. COMRAS: I don't know if we need more  
23 jurors because of that, Judge, but I wanted to  
24 throw that out.

25 THE COURT: I think I'm bring in?

1 MS. KREIZINGER: 60.

2 THE COURT: I think I already asked for 70. We  
3 can comfortably get, not comfortably, but we can  
4 get 70 in here. Hopefully, we can get a jury. How  
5 many strikes would that be total?

6 MS. KREIZINGER: 12 each, so we are at 48.

7 THE COURT: Well, if you use all of your  
8 strikes, obviously, we are not going to get a panel  
9 out of that. You have four defendants?

10 MR. COMRAS: Three.

11 THE COURT: 9 and 9 is 18.

12 MS. KREIZINGER: Okay.

13 THE COURT: Nine and you get nine.

14 MS. KREIZINGER: I guess on behalf of the  
15 Hospital, okay. Okay.

16 THE COURT: Hopefully, we won't need all 18.  
17 Okay, anything else before we all go to lunch?

18 MS. KREIZINGER: No.

19 THE COURT: Sounds like a an interesting case,  
20 so I'm actually looking forward to trying it,  
21 although I will not be too upset if you settle it.  
22 You have my permission to keep on talking. Any  
23 questions of me? Trial procedures?

24 MS. KREIZINGER: When do you normally start  
25 and stop and lunch?

1                   THE COURT: That is a good question. My hope  
2 would be most of the days, again, Monday, I usually  
3 have special sets, so we will not be convening on  
4 Mondays. My hope is start promptly at 9:30. I  
5 will be done my by then, 20-minute break in the  
6 morning and one in the afternoon. I try to keep  
7 lunch to an hour, hour and fifteen minutes.  
8 Sometimes I have to take longer, there are things  
9 that I have to do, too. I will try to keep it.  
10 Try not to go past 5:00, unless there's a witness  
11 on the stand. Obviously, we can finish up, I will  
12 go past 5:00, if it is going to be much later, it  
13 will be a special circumstance, we are under  
14 restrictions not to go past five because of  
15 overtime, and other problems the clerks have. I'll  
16 do my best to finish at 5:00.

17                  MS. KREIZINGER: Are all Mondays out, then?

18                  THE COURT: I believe they are.

19                  MS. KREIZINGER: Okay.

20                  THE COURT: I will take a look.

21                  MS. KREIZINGER: We have an expert paid for on  
22 the first Monday after trial.

23                  THE COURT: You can call Ms. Brant, and  
24 inquire of my calendar. She can tell you that  
25 information.

1                   MR. COMRAS: All Mondays are off?

2                   THE COURT: I believe so. Any other  
3 questions?

4                   MR. WEBBER: When does your Honor want jury  
5 instruction as soon as?

6                   THE COURT: Good question. I would like the  
7 Jury instructions, typically, at the beginning of  
8 the trial. I like to review them, the theories of  
9 the case, the way things are going. If possible,  
10 then, three packets, agreed upon and then your  
11 special requests, and a copy of the proposed  
12 verdict form.

13                  MS. KREIZINGER: Okay.

14                  THE COURT: Anything else?

15                  MS. KREIZINGER: That's it.

16                  THE COURT: Very interesting. Good argument,  
17 everybody. We will be adjourned. Have a great  
18 lunch.

19                  (HEARING CONCLUDED: 11:52 A.M.)

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## 1 CERTIFICATE OF REPORTER

2 STATE OF FLORIDA

3 COUNTY OF BROWARD

4

5 I, MELISSA KALLAS, Court Reporter and Notary  
6 Public for the State of Florida, do hereby certify that  
7 I was authorized to and did stenographically report the  
8 foregoing hearing; the foregoing hearing was taken  
9 before me; and that the transcript is a true and  
10 correct record of my stenographic notes.

11

12 I further certify that I am not a relative,  
13 employee, attorney or counsel of any of the parties,  
14 nor am I a relative or employee of any of the parties'  
15 attorney or counsel connected with the action, nor am I  
16 financially interested in the action. Dated this 21st  
17 day of October, 2015.

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